No. 10514

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KENNETH ALEXANDER,

Appellant,

vs.

LT. GEN. JOHN L. DEWITT, Commanding General of the United States Army of the Western Defense Command and Fourth Army, and R. B. HOOD, Special Agent in Charge of the Federal Bureau of Investigation of the United States Department of Justice located at Los Angeles,

Appellees.

Upon Appeal from the District Court of the United States for the Southern District of California,

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BRIEF FOR THE APPELLEES.

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GOVERNMENT'S BRIEF.

Jurisdiction.

This is an appeal from a judgment of the United States District Court for the Southern District of California, Central Division, entered June 15, 1943, which denied appellant's motion for an injunction *pendente lite* and which granted a motion of the appellees that the appellant's complaint be dismissed on the ground that it did not state facts sufficient to constitute a cause of action [R. 35-46].[1] The jurisdiction of the District Court was in-

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[1]The symbol "R." will be used to designate the pages of the transcript of record, and the symbol "S. R." will be used to designate the pages of the supplemental transcript of record.

voked under Section 24, as amended, of the Judicial Code (United States Code, Title 28, Sec. 41(1)) [R. 2-3, 12-17]. The jurisdiction of this Court is invoked under Section 128, as amended, of the Judicial Code (United States Code, Title 28, Sec. 225).

Orders, Proclamations and Statutes.

By Executive Order No. 9066, dated February 19, 1942 (7 F. R. 1407) in so far as here relevant, the President authorized and directed—

> "* * * the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion."

The Executive Order further authorized and directed—

> "* * *the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal Troops and other Federal Agencies, with authority to accept assistance of state and local agencies."

Under date of February 20, 1942 the Secretary of War, acting pursuant to Executive Order No. 9066, designated

Lt. Gen. DeWitt as the Military Commander to carry out the duties and responsibilities imposed by the Executive Order for that portion of the United States embraced in the Western Defense Command [Government's Exhibit 4; reprinted on p. 4 of the appendix to the appellant's brief]. Acting under authority of his designation by the Secretary of War and under authority of Executive Order No. 9066, Lt. Gen. DeWitt issued Public Proclamations Nos. 1 and 2 on March 2 and March 16, 1942, respectively, which established military areas comprising portions of specified states within the Western Defense Command (7 F. R. 2320; 7 F. R. 2405).

The Act of March 21, 1942 (Public Law 503, 77th Cong., 2d Sess., c. 191, 56 Stat. 173, U. S. C. 97a) reads:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of war or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.
>
> Approved, March 21, 1942.

In an order entitled, "Individual Exclusion Order No. 1K-7," dated April 14, 1943, addressed to the appellant, Lt. Gen. DeWitt stated that "Under authority of Executive Order 9066, February 19, 1942, and letter of the Secretary of War, February 20, 1942, and pursuant to a determination that the present action is dictated by military necessity," the appellant was prohibited, after the expiration of ten days from the date of receipt of the order, from "being in, remaining in, or entering into" specified military areas established by General DeWitt's Public Proclamations Nos. 1 and 2, which areas included within them appellant's place of residence, and specified military areas established by other Military Commanders pursuant to Executive Order No. 9066. In addition to these provisions and the provisions with respect to the appellant's duty to make reports, which are not here relevant, the order recited:

> "Failure to comply with the foregoing will subject you to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled, 'An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing any Act in Military Areas or Zones.'" [R. 26-28.]

Statement of the Case.

The appellant's complaint, which prayed for a temporary restraining order, a preliminary and a permanent[1] injunction, and for damages [R. 17-18], alleged, in summary, in addition to jurisdictional allegations, that the plaintiff was and has been since 1915 a citizen of the United States; that plaintiff had performed specified acts indicative of his loyalty and attachment to the United States; and that he had at all times been a law-abiding citizen [R. 2-6, 11-12]. The complaint further alleged that the appellant received a notice on February 27, 1943 advising him that a Board of Officers had been appointed by the Commanding General of the Western Defense Command to consider whether military necessity required the appellant's exclusion from certain military areas, that the appellant could, if he wished, appear before such Board of Officers on March 11, 1943, and that he would then be informed of the general nature and scope of the inquiry and be afforded an opportunity to present evidence in his own behalf; that appellant appeared before the Board that the Board made various inquiries into appellant's activities; that individual exclusion order 1K-7 prohibiting appellant's presence in certain military

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[1]The complaint has been treated in this brief as a complaint for preliminary and permanent injunctive relief, since it includes a prayer for both a temporary and permanent injunction, even though the caption does not state that it is a complaint for a permanent injunction [R. 2]. Under Rule 10 of the Federal Rules of Civil Procedure (U. S. C., Title 28. foll. Sec. 723(c)) it is unnecessary in any event for the caption to state more than the word "complaint." Thus the language in the caption should not be considered to limit the scope of the complaint.

areas including his place of residence was thereafter served upon him; and that a petition to Lt. Gen. DeWitt with respect to the recession of the order was thereafter denied [R. 7-11, 23-25]. Further, the appellant alleged that he was not a member of the military forces of the United States nor subject to military law; that no martial law had been declared within the continental United States; that the Courts within the United States have continued to be open; that the procedure by which the individual exclusion order was issued was deficient in specified respects and that it was arbitrarily and capriciously issued and without the support of evidence; and that it was not warranted by military or any other necessity [R. 12-14]. The complaint further alleged that the appellees had enforced and were threatening to continue to enforce the order and that such enforcement had and would cause irreparable damage to the appellant as well as the abridgment of specified constitutional rights of the appellant [R. 14-15]. The appellant also made various allegations as a separate cause of action for damages.

Annexed to the complaint was a copy of an order entitled, "Individual Exclusion Order No. IK-7," in which appellee DeWitt ordered the plaintiff excluded from specified military areas. The order contained no threat or statement as to any intended manner of enforcement of this order other than the statement quoted on page 3 above, to the effect that failure to comply with the order would subject the plaintiff to criminal penalties.

A hearing was held on May 25, 1943 on appellant's motion for an injunction *pendente lite* [R. 29] and on appellees' motion to deny the application for such injunc-

tion, to strike certain portions of the complaint, and to dismiss the complaint for failure to state a claim upon which relief can be granted [R. 30-31]. The appellees' motion to strike was denied in part and granted in part; the cause of action for damages was stricken on the appellant's motion; the appellant's motion for permanent injunctive relief was denied; and the motion of appellees to dismiss the complaint was granted. The ground of decision of the District Court was that a criminal prosecution would not be enjoined and the complaint failed sufficiently to allege that the appellee DeWitt intended to carry out his order in any other manner, and, therefore, failed to allege an imminent threat of enjoinable injury [R. 33-37, S. R.].[1]

Question Presented.

The question presented is whether the Court below correctly determined that the appellant's complaint for injunction failed to state a cause of action on the ground that a criminal prosecution is not enjoinable under the circumstances of this case, and on the ground that the complaint did not contain clear and sufficient allegations with respect to a threat of physical expulsion from the Western Military Areas.

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[1]Although it is not in the record, appellees, for whatever relevance, if any, it may have, state that on September 6, 1943 appellant was expelled from the Western Military Areas.

ARGUMENT.

POINT I.

The Complaint for Injunctive Relief Was Properly Dismissed by the Court Below for Failure to State a Cause of Action in That it Did Not Sufficiently Allege Facts Showing an Imminent Threat of Irreparable Injury.

It is familiar law that the two fundamental criteria of whether injunctive relief is proper are whether there is an imminent threat of action by the parties against whom the injunction is sought and whether irreparable damage would occur to the plaintiff if such threatened act were committed. Accordingly, a complaint does not state a cause of action for an injunction, unless it adequately alleges an imminent threat of action which would cause irreparable damage. Furthermore, the particular respects in which the plaintiff is imminently threatened with irreparable injury must be alleged. The familiar rule of pleading that mere statements of conclusions of law are insufficient and that facts must be alleged in support of the esesntial grounds of a cause of action is applied with strictness in injunction proceedings because of the extraordinary nature of the remedy. (See cases cited, *infra.* p. 10.)

In the instant case the only allegations which could, with the greatest latitude, be construed to pertain to an imminent threat of action injurious to the plaintiff were those contained in Paragraph 13 of the complaint, reading:

> "The defendants have, since April 14, 1943, enforced and are enforcing said orders at the present time, and they have threatened, and they intend to,

carry out and enforce said orders and each of them; and will, unless restrained from so doing by order of this Court, carry out and execute each of said orders." [R. 14.]

The only allegation bearing on the irreparability of the injury to be suffered as a result of such enforcement is contained in Paragraph 14, reading:

> "The plaintiff has already suffered irreparable injury by the enforcement by the defendants of the orders aforesaid, and will continue to suffer irreparable injury by virtue of the enforcement of said orders, unless said enforcement is restrained by orders of this Court. Plaintiff does not have an adequate remedy at law." [R. 16.]

Neither of these paragraphs of the complaint, with all assistance that can be obtained for them from the rest of the complaint, satisfy the standard described above with respect to the sufficiency of a complaint for injunctive relief.

1. Assuming That the Complaint Adequately Alleges an Imminent Threat of Criminal Prosecution, it Does Not Allege Facts Showing That Such Criminal Prosecution Would Cause Irreparable Damage, and Thus it Does Not Allege Facts Furnishing a Basis for Injunctive Relief.

At the outset it must be noted that the Civilian Exclusion Order, which was annexed as Exhibit "F" to the appellant's complaint, did not state any means by which it would be enforced other than through the criminal pen-

alties provided by the Act of March 21, 1942, set forth, *supra,* p. 4 [R. 28]. Likewise, the notice of the hearing before the Board of Officers, annexed to the complaint as Exhibit "E," refers only to this method of enforcement [R. 7-8, 23-25]. We will assume *arguendo* that Paragraph 13, when read in conjunction with the annexed Exclusion Order and Notice of Hearing, sufficiently alleges an imminent threat of criminal prosecution for failure to comply with the Order, even though the complaint lacks sufficient definiteness in this respect. It is established, however, that a threat of criminal prosecution does not in itself constitute a threat of irreparable damage. The fact that the plaintiff must risk conviction in order to test the constitutionality of the order, and the fact that he must obey what he considers to be an unconstitutional order unless he is willing to assume this risk, is a fact which is a concomitant of every suit for an injunction to prevent the enforcement of a criminal statute which is alleged to be unconstitutional; and the existence of such facts do not entitle the plaintiff to injunctive relief. (See *Beal v. Missouri Pacific R. Co.,* 312 U. S. 45. 51.) To state a cause of action for injunctive relief based on the threat of criminal prosecution, the complaint must allege that the plaintiff is threatened with multiple prosecutions (See *Davis & Farnum Mfg. Co. v. Los Angeles,* 189 U. S. 207, 219; *Watson v. Buck,* 313 U. S. 387, 400; *Beal v. Missouri Pacific R. Co., supra,* at p. 50; *Cline v. Frink Dairy Co.,* 274 U. S. 445,

451), or with the necessity for defending in multiple suits of any type (See *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276. 283); or that such threat will cause irreparable damage to his property (See *Cline v. Frink Dairy Co., supra; Cavanaugh v. Looney*, 248 U. S. 453, 456; *Davis & Farnum Mfg. Co. v. Los Angeles, supra*); or in some other respects will cause him irreparable damage arising from extraordinary circumstances which take his case out of the usual rule that equity will not enjoin a criminal prosecution. (See *Watson v. Buck, supra; Spielman Motor Sales Co. v. Dodge*, 295 U. S. 89, 95; *Boynton v. Fox West Coast Theatres Corp.*, 60 F. (2d) 851, 854; *Beal v. Missouri Pacific R. Co., supra.*) There can be no doubt that there are no allegations in the complaint of any such extraordinary circumstances, and that, even construing it most liberally, the complaint does not indicate that any such circumstances exist.

2. The Complaint Does Not Clearly Allege an Imminent Threat of Enforcement of the Exclusion Order Through Any Means Other Than Criminal Prosecution.

The complaint cannot be construed to allege a threat of enforcement by any means other than criminal prosecution. As noted above, the only allegation of the complaint with respect to enforcement is that the appellees are threatening to enforce "the orders," referring to the Civilian Exclusion Order and the Notice of Hearing, which stated that appellant's exclusion was being considered; neither the Order nor the Notice refers to any method of en-

forcement other than criminal prosecution.[1] There is no allegation in the complaint that the appellees have threatened or have done any act looking toward any other type of enforcement.[2] While it is true that under Executive Order No. 9066 appellee DeWitt has the power to enforce the Exclusion Order by forcible expulsion of the appellant, there is no allegation in the complaint pertaining to this power or to the fact that the appellee intends to employ it. It is conceded that the pleadings can be construed in the light of matters of which the Court may take judicial notice, and that this category of matters includes Executive Order No. 9066. Nevertheless,

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[1]A search of the complaint for any indication that it should be construed to allege a threat of forcible expulsion rather than, or in addition to, a threat of criminal prosecution, reveals only one possibility; and we believe, that one to be without merit. While the allegation with regard to the threat of injury is that there is a threat of enforcement by the appellees, and while it is true that neither appellee could himself institute a criminal prosecution whereas the appellee DeWitt could himself institute forcible expulsion, nevertheless the appellees could "enforce" the Civilian Exclusion Order in the sense in which the term "enforce" is generally used. A common usage of the term "enforce" is in the sense of "cause to take effect." (Black's Law Dictionary, 3rd Ed., 1933; Webster's New International Dictionary, 2nd Ed.) See *United States v. Gordin*, 287 Fed. 565, 571 (D. Ohio, 1922), which involved a statute appropriating funds "to enable the Bureau . . . to enforce the government regulations," where the Bureau enforced the regulations by having a suit brought by the United States Attorney. See, also, *Widener v. Sharp*, 109 Neb. 766, 772; 192 N. W. 726, 728 (1923), where the Court said that "The word 'enforce' does not necessarily imply actual force or coercion, but may mean . . . to cause to have force or effect, or to be executed; to put in execution; to cause to take effect." In the instant case it is clear that the appellees could enforce the order by attempting to cause the institution of criminal prosecution and that this was the method indicated by the orders annexed to the complaint. The fact that the term "execute" is also used in the paragraph alleging the threat of enforcement cannot be regarded as significant, since this word is often used synonymously with "enforce." (Webster's New International Dictionary, 2d Ed.; *Tennant v. Kuhlemeier*, 142 Iowa 241, 245; 120 N. W. 689, 693 (1909) (dissenting opinion).)

[2]Compare *Washingtonian Home of Chicago v. Chicago*, 281 Ill. 110, 117 N. E. 737 (1917), where the Court held that a bill for an injunction which alleged that the defendant threatened prosecution for violation of a building ordinance and alleged that the defendant threatened to prevent the plaintiff from using the building in issue should not be construed as alleging that the plaintiff was threatened with any method of enforcement of the ordinance (such as forcible ejection) other than prosecution.

judicial notice of the Executive Order cannot in any way affect the deficiency in the complaint in so far as it fails to allege that any act had been done by the appellees indicating an intent to enforce the order through forcible expulsion. The mere fact that appellee DeWitt possessed the power to effect such forcible expulsion does not indicate that such expulsion was threatened. (See *Southern Pacific Co. v. Conway,* 115 F. (2d) 746, 749 (C. C. A. 9th, 1940).) At the most the existence of this power indicates the mere possibility that forcible expulsion might be undertaken, and judicial notice of Executive Order No. 9066 may thus be considered to supply an allegation of such a possibility. However, it is well established that an allegation of such a possibility is insufficient to establish a cause of action for an injunction; the threat must be imminent—not conjectural, distant, or speculative. (See *New Jersey v. Sargent,* 269 U. S. 328, 338-339; *New York v. Illinois,* 274 U. S. 488, 489; *Connecticut v. Massachusetts,* 282 U. S. 660, 674.)

As noted above, moreover, the respects in which the plaintiff is imminently threatened with irreparable damage must be alleged with specificity in a complaint for an injunction in order for it to be upheld as against a motion to dismiss. (See *Boise Artesian Water Co. v. Boise City,* 213 U. S. 276, 285. See also, *E. I. Dupont de Nemours & Co. v. Boland,* 85 F. (2d) 12, 15 (C. C. A. 2d, 1936); *Hegeman Farms Corp. v. Baldwin,* 293 U. S. 163, 170: *United States v. Marine Engineers Ben. Assn. No. 38,* 277 Fed. 830, 834 (W. D. Wash., N. D., 1921); *Milliken v. Stone.* 16 F. (2d) 981, 984 (C. C. A. 2d, 1927); *Cruickshank v. Bidwell,* 176 U. S. 73, 81; *Universal Rim Co. v. General Motors Corp.,* 31 F. (2d)

969, 970(C. C. A. 6th, 1929); *High, Injunctions* (4th Ed., 1905) Sec. 34; *Haldeman-Julius Publishing Co. v. Kiely,* 63 F. (2d) 814, 815 (C. C. A. 2d, 1933).) Measured by this standard it is clear that the court below was correct in its conclusion that the complaint did not sufficiently allege an imminent threat of forcible expulsion.

There is, of course, no doubt that the sufficiency of the complaint must be tested by its allegations, and not by unpleaded facts which do, or may in the future, exist. (See *Mosher v. Phoenix,* 287 U. S. 29, 30; *Levering & G. Co. v. Morrin,* 289 U. S. 103, 105; *Trustees System Co. of Pennsylvania v. Payne,* 65 F. (2d) 103, 104 (C. C. A. 3d, 1933).) Thus the fact that on September 6, 1943, appellant was expelled from the Western Military Areas cannot be considered in passing on the sufficiency of the complaint. Compare Holmes, J., in *Ithaca Trust Co. v. United States,* 279 U. S. 151, 155:

> "Tempting as it is to correct uncertain probabilities by the now certain fact, we are of the opinion that it can not be done . . ."

* * * * * * * * *

Since the complaint did not allege facts showing that the plaintiff would suffer irreparable damage as a result of criminal prosecution for failure to obey the Exclusion Order and since the complaint did not adequately allege an imminent threat of any other type of enforcement of the Order, the complaint failed to allege an imminent threat of irreparable injury and thus it did not state a cause of action for injunctive relief.

POINT II.

If This Court, However, Should Find That the Complaint Did Sufficiently Allege a Threat of Physical Expulsion, Then the Case Should be Remanded for Further Proceedings.

It cannot be doubted that the sole issue considered by the District Court was whether the complaint sufficiently alleged that the defendant threatened physical expulsion, or whether it alleged merely that the defendant threatened to institute criminal prosecution. The defendants' motion, in so far as here relevant, was that the complaint be dismissed for failure to state a claim as to defendants upon which relief could be granted [S. R. 82, 83]. The course of the proceedings in the District Court on motion to dismiss makes it abundantly clear that the District Court did not determine the constitutionality of the exclusion order, or whether, if forcible expulsion had been sufficiently alleged,[1] a temporary injunction would have issued. In fact, the court expressly states that this question was not before it, and indicates that had it been before it, a

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[1]The Court repeatedly indicated that it construed the pleading as alleging solely a threat of criminal prosecution. At S. R. 93, 94, there is the following colloquy:

> "Mr. Wirin: May I just inquire, is it your Honor's interpretation or construction of the pleadings before the Court and the statements made by counsel for the defendants that there is no threat of or immediate danger of any physical removal of the plaintiff from this area?
>
> The Court: That is the way it appears to me now.
>
> Mr. Wirin: That is the only relief we are asking. Now, if there were that assurance, by the judicial requirements of the state of the pleadings and statements of counsel, then we agree with the Court there is no warrant for issuing any injnctive relief.
>
> The Court: I don't think your complaint states a cause of action for that reason. I don't think there is anything here. If there was

temporary order might have been granted [S. R. 83, 85, 86, 87, 89, 93, 94].

Nor did the Court pass upon other possible defenses to the maintenance of these proceedings that might have been raised either by the defendants or the Court itself, *sua sponte,* such as the absence of Federal jurisdiction under Section 24(1) of the Judicial Code. (*Cf. McNutt v. General Motors Acceptance Corp.,* 298 U. S. 178.)

In these circumstances, if this Court should conclude that the District Court granted the motion to dismiss upon an erroneous ground, the case should be remanded to the District Court for further proceedings so that the defendants may present such other defenses as may be available against the maintenance of these proceedings or upon the merits.

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a threat that he was going to physically remove this plaintiff from this jurisdiction or from his home or from a Military area, then I think you would have something that would now be before the Court, but all he is threatening to do is to enforce the law, the Act of Congress; that 'if you don't do this,' why, then it is up to some other department of the Government.

Mr. Wirin: But there is the allegation in the complaint, after a recital of the order and its terms, that the defendants threaten to enforce the order.

The Court: Well, I think there has to be more than that, Mr. Wirin, I mean, just a mere conclusion that they threatened to enforce the order. The manner of enforcement is indicated.

Mr. Wirin: But it is not an exclusive manner.

The Court: If you had alleged that he had seen General DeWitt or Captain So-and-so, or Major This, or somebody else, and they had told him, 'We are going to physically remove you from the District,' then there might be something further; but here is a mere allegation of threat.

So I think that the motion to grant the injunction *pendente lite* will be denied. As a matter of fact, I think that I am compelled under my view to grant the motion to dismiss until there is some physical threat shown, and the motion to dismiss will be granted."

See also, S. R. 71, 73, 88, 89, 90.

Conclusion.

The judgment of the District Court should be affirmed on the ground that the complaint failed to allege a threat of any action on the part of the defendant other than the institution of criminal proceedings and, therefore, failed to state a cause of action. If this Court should determine otherwise, however, then the case should be remanded to the District Court for further proceedings.

Respectfully submitted,

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